Petition

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In the Supreme Court of the United States

OCTOBER TERM 1981

NORTH CAMBRIA FUEL COMPANY, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petition For Writ Of Certiorari

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. **Does The Court Of Appeals' Decision That An Employer May Not Terminate A Striking Employee Who Bands Together With Other Striking Employees To Engage In Mass Picketing, To Threaten And Intimidate Nonstriking Employees And To Obstruct The Employer's Operations Conflict With Decisions Of Other Circuit Courts And With Decisions Of The United States Supreme Court?**

II. **Does The Court Of Appeals' Decision That NCF Must Reinstate Hans P. Wuchina Conflict With The Policy Of The National Labor Relations Act?**

III. **Does The Court of Appeals' Decision That The Dismissal Of Hans P. Wuchina Constitutes An Unfair Labor Practice Conflict With The Provisions Of The National Labor Relations Act?**

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OPINIONS BELOW

North Cambria Fuel Company, Inc. ("NCF") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the court's judgment dated June 12, 1981 in *North Cambria Fuel Company, Inc., Petitioner, v. National Labor Relations Board, Respondent, and Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman and Dale Basinger, Intervenors,* No. 80-1381, and *Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman and Dale Basinger, Petitioners, v. National Labor Relations Board, Respondent, and North Cambria Fuel Company, Inc., Intervenor,* No. 80-1568. The opinion and judgment of the court of appeals is reported at 645 F.2d 177. A copy of the opinion, which is dated April 10, 1981, is reproduced as Appendix A to this petition. A copy of the judgment of the court of appeals of June 12, 1981 appears as Appendix B.

The judgment sought to be reviewed affirmed the Decision and Order of the National Labor Relations Board ("Board") of February 26, 1980 wherein the Board affirmed in part and reversed in part the July 11, 1979 Decision of the Administrative Law Judge of the Board ("ALJ"). The Decision and Order of the Board of February 26, 1980 and the Decision of the ALJ of July 11, 1979 have not been officially reported. A copy of the Decision and Order of the Board is designated as Appendix C to this petition. A copy of the Decision of the ALJ is Appendix D.

STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on June 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This proceeding involves Sections 8(a) (1), 8(a) (3) and 10(c) of the National Labor Relations Act, 29 U.S.C. §§158(a) (1), 158(a) (3) and 160(c). These statutory provisions are set forth in Appendix E.

STATEMENT OF THE CASE

This appeal from the judgment of the court of appeals involves a labor dispute between NCF, a business engaged in coal production in Western Pennsylvania, and the United Mine Workers of America ("UMWA"), the designated representative of NCF's employees. North Cambria Fuel Company, the predecessor to NCF, and the UMWA were parties to the National Bituminous Coal Wage Agreement of 1974. When that agreement expired on December 6, 1977, the UMWA called a strike against all signatories, including North Cambria Fuel Company. Appendix ("App.") A at A-2.

The nationwide strike continued until March 26, 1978 when the UMWA entered into a new agreement with the Bituminous Coal Operators Association ("BCOA"). On that date, the employees of North Cambria Fuel Company returned to work for NCF. App. A at A-2.

NCF is not a member of the BCOA and did not enter into the agreement with the UMWA. Subsequent to March 26, 1978, NCF and the UMWA attempted to negotiate a new agreement. No agreement was reached by May 16, 1978, and the UMWA directed its members to engage in a strike against NCF. App. A at A-2; App. C at C-2.

The strike against NCF was marked by violence. Between May 16, 1978 and July 9, 1978, NCF's equipment and work sites were vandalized, resulting in damages of $50,000.00 to $60,000.00. Employees and independent contractors who continued to work for NCF during the strike were physically

assaulted, verbally threatened and shot at with firearms. App. A at A-2; App. D at D-3.

On June 6, 1978, NCF obtained injunctions aimed at restraining the violence. The injunctions prohibited the UMWA from maintaining more than four pickets at NCF's work sites and from otherwise interfering with NCF's operations. App. A at A-2.

The UMWA was undaunted by the court orders. On July 9, 1978 the UMWA called a meeting of its membership to protest NCF's continued operations and to organize a "show of force" against NCF. The meeting was boisterous, the participants were angry and the UMWA ordered its members to disrupt NCF's operations. App. A at A-2; App. D at D-3, D-4.

The union members promptly responded to the UMWA's directives. Later that same day, an officer of NCF was physically assaulted by a striking employee. During the night, a coal loading facility operated by NCF was totally destroyed by fire. App. D at D-3, D-4.

The next day, July 10, 1978, 20 to 25 pickets, including striking NCF employee Hans P. Wuchina, gathered at a second coal loading facility operated by NCF and known as "I-22". As six coal trucks approached I-22, Wuchina and numerous other pickets rushed to block the entrance. The pickets' admitted purpose was to frighten the truck drivers and to obstruct NCF's operations. In pursuit of this purpose, the pickets shouted threats and vulgarities at the truck drivers. Each of the pickets carried a rock which he threatened to throw at the nonstriking workers. App. C at C-3, C-4.

The violence was disrupted by the arrival of the county sheriff, who ordered the pickets to disperse. Exhibiting token compliance with the sheriff's orders, the pickets retreated temporarily to the side of the roadway opposite the entrance to I-22. App. C at C-3; App. D at D-4, D-5.

With the pickets observing the activities, the sheriff escorted the six coal trucks into the facility. Four of the six trucks departed I-22 under the sheriff's supervision. When the two remaining trucks attempted to leave after the sheriff's departure, 12 to 15 of the remaining pickets attacked the truck drivers hurling a number of stones, many of which struck one truck and broke the windshield. App. A at A-3; App. C at C-3; App. D at D-5. The truck driver and other nonstriking employees recognized the following NCF employees throwing stones: Hans P. Wuchina, Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman and Dale Basinger. App. D at D-5; Court of Appeals Joint Appendix ("J.A.") at 282a-284a, 300a-307a, 311a-312a, 314a.

Following the violence at I-22 NCF filed contempt charges against the strikers named by the workers. After a hearing, each of the striking employees was found to be in contempt of court. App. A at A-3.

NCF also filed criminal complaints against Hans P. Wuchina, Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman and Dale Basinger, charging each with riot, criminal trespass and the propulsion of missiles into an occupied vehicle. Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman and Dale Basinger, entered guilty pleas to the reduced charge of disorderly conduct. NCF subsequently discharged these employees for their illegal conduct at I-22. App. A at A-3.

Hans P. Wuchina pleaded not guilty to the criminal charges. During his preliminary hearing, Wuchina claimed that he left I-22 shortly after the sheriff arrived. Notwithstanding his protestations of innocence, Wuchina was bound over for trial on all of the charges which had been filed against him. NCF terminated Wuchina's employment after the preliminary hearing. The charges against Wuchina were subsequently dis-

missed for failure of the state to prosecute within a reasonable time. App. A at A-3.

The discharged employees, including Hans P. Wuchina, filed complaints against NCF with the Board. After a hearing, the ALJ issued a Decision dated July 11, 1979 in which she determined that NCF committed an unfair labor practice under Section 8(a) (1) and (3) of the National Labor Relations Act by discharging the employees who participated in the mass picketing and violence at I-22. The ALJ recommended that NCF reinstate each of the discharged employees. App. A at A-3.

NCF appealed the ALJ's Decision to the Board. Reversing the ALJ, the Board held the Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman and Dale Basinger engaged in serious strike misconduct and were not eligible for reinstatement. The Board adopted the finding of the ALJ that Wuchina left I-22 prior to the sheriff's departure. Based on this finding, the Board held that Wuchina's participation in the initial attack on the coal trucks was not sufficiently serious to justify termination. App. C at C-2—C-4.

Pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f), NCF appealed the Board's decision pertaining to Hans P. Wuchina to the Court of Appeals for the Third Circuit. The remaining discharged employees appealed the Board's order that they were lawfully discharged. App. A at A-2.

In an opinion dated April 10, 1981, the court of appeals affirmed the Board's Decision and Order. The court adopted the finding of the Board and the ALJ that Wuchina was present during the initial outbreak of violence at I-22, but that he left the scene shortly after the sheriff ordered the pickets to disperse and prior to the stone throwing incident. App. A at A-4, A-5. The lower court further determined that the activities of the

pickets prior to the sheriff's arrival did not amount to strike misconduct sufficiently serious to justify termination. The court of appeals held that the obstruction of the entrance to I-22 was insignificant since the pickets complied with the sheriff's directions to disperse. The court further held that the cumulative use of abusive, vulgar and profane language and threats and provocations by striking employees is not serious misconduct. App. A at A-6, A-7. The court failed to attribute any significance to the admitted fact that the pickets carried rocks which they threatened and intended to throw at the nonstriking employees, but for the timely intervention of a law enforcement officer.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. THE COURT OF APPEALS' DECISION THAT AN EMPLOYER MAY NOT TERMINATE A STRIKING EMPLOYEE WHO BANDS TOGETHER WITH OTHER STRIKING EMPLOYEES TO ENGAGE IN MASS PICKETING, TO THREATEN AND INTIMIDATE NONSTRIKING EMPLOYEES AND TO OBSTRUCT THE EMPLOYER'S OPERATIONS CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AND WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The federal courts are frequently called upon, as a consequence of a labor dispute, to determine whether or not the conduct of striking employees is protected under the National Labor Relations Act. The question which is raised is whether or not the employees' actions constitute serious strike misconduct.

The answer to the question of what is serious strike misconduct holds significant consequences for all employers and employees who engage in a business which affects interstate commerce. The employer who terminates an employee for

strike misconduct which is not deemed to be serious commits an unfair labor practice in violation of Section 8 of the National Labor Relations Act for which he may be ordered, under Section 10(c) of the Act, to provide redress of reinstatement and back pay, including most recently, substantial interest on the amount of back pay.

The employee likewise proceeds at his own risk. While some conduct is protected, the employee may be discharged, without recourse, if he engages in certain strike related activities.

As a consequence of the important choices facing employers and employees embroiled in a labor dispute, there is a special need for a uniform definition of serious strike misconduct. Neither Congress nor the courts intended that the same conduct by striking employees should result in discharge in one case and reinstatement in another. Employers and employees have the right to know when the employees' conduct falls outside the protection of the Act.

The Supreme Court has had limited opportunity to determine under what circumstances an employer may terminate the employment of a striking employee for misconduct during the course of a strike. In *N.L.R.B. v. Fansteel Metallurgical Corporation,* 306 U.S. 240, 59 S.Ct. 490 (1939), striking employees engaged in a "sit-down strike", occupying the employer's plant for ten days. The Court held that the employer had the right to terminate those employees who positioned themselves inside the plant, as well as the employees who provided food, clothing and other supplies to the sit-down strikers. While an employee may have the unquestioned right to quit work, this right does not contemplate or protect acts of force and violence designed to compel the employer to submit to the employee's demands.

In *Allen-Bradley Local No. 1111, Etc. v. Wisconsin Employment Relations Board,* 315 U.S. 740, 62 S.Ct. 820

(1942), the Court held that the National Labor Relations Act does not protect strike misconduct which consists of mass picketing to hinder or prevent access to the employer's plant and intimidation of nonstriking employees by threats of bodily injury and property damage. Delivering the opinion of a unanimous Court, Justice Douglas stated:

> "And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act." 315 U.S. at 750, 62 S.Ct. at 826.

Following the lead of the Supreme Court, the majority of the circuit courts have refused to countenance forceful conduct by striking employees. The Court of Appeals for the Sixth Circuit held that striking employees who impede the free flow of traffic into or from a struck plant forfeit their right to reinstatement. *W.J. Ruscoe Company v. N.L.R.B.*, 406 F.2d 725 (6th Cir. 1969). In *Kayser-Roth Hosiery Company, Inc. v. N.L.R.B.*, 447 F.2d 396 (6th Cir. 1971) the court held that strikers who engage in such obstructionist conduct violate the right of nonstriking employees to unmolested ingress to and egress from their job and the acknowledged right of the employer to use its property during a strike.

The Courts of Appeals for the Fourth and Fifth Circuits also prohibit conduct which impairs the rights of employees who elect to refrain from participating in a strike. In *N.L.R.B. v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), the Board ordered the employer to reinstate employees who verbally threatened to harm employees who attempted to work during a strike. On appeal, the circuit court reversed the Board's decision, holding that strikers who make threats to nonstriking employees are not entitled to reinstatement. In *N.L.R.B. v. Longview Furniture Co.*, 206 F.2d 274, 275 (4th

Cir. 1953), the court held that the National Labor Relations Act does not protect "employees who have banded together in hurling profane, obscene and insulting epithets at employees who are attempting to work, in an effort to degrade and humiliate them publicly and prevent their working." *See also, N.L.R.B. v. Pepsi-Cola Company of Lumberton, Inc.*, 496 F.2d 226 (4th Cir. 1974).

The fact that threatening and intimidating actions do not result in injury to nonstriking employees does not diminish the impact of the offensive conduct. In *N.L.R.B. v. Trumbull Asphalt Co. of Del.*, 327 F.2d 841 (8th Cir. 1964), the employer was not required to reinstate a striking employee who brandished, but did not throw, a stone at a nonstriking employee. *Accord, N.L.R.B. v. Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943). *See also, W.T. Rawleigh Co. v. N.L.R.B.*, 190 F.2d 832 (7th Cir. 1951).

The opinion and judgment of the court of appeals in this case is patently inconsistent with the decisions of the Supreme Court and the other circuit courts. In directing NCF to reinstate Hans P. Wuchina, the court of appeals has validated strike misconduct which has been expressly condemned in numerous other cases.

The most reliable description of Wuchina's conduct at I-22 may be found in the decisions of the ALJ and the Board. The ALJ determined that Wuchina attended a union meeting on July 9, 1978 at which the members were admonished to "get as many pickets there as we can," "to put on a show of force," and "to keep the trucks from coming in and for North Cambria Fuel to sign a contract." App. D at D-3, D-4.

Complying with these directives, 20 to 25 pickets, including Wuchina, congregated at I-22 the next day. The pickets blocked the entrance to the facility, shouting vulgarities and provocations at the truck drivers. The ALJ and the Board found that each picket carried a stone which he threatened to

throw at the truck drivers until a local sheriff intervened and directed the pickets to disperse. App. C at C-3, C-4; App. D at D-4, D-5.

The actions of the pickets at I-22 in which Wuchina participated coincide with the definition of serious strike misconduct adopted by the Supreme Court and by the Courts of Appeals for the Fourth, Fifth, Sixth, Seventh and Eighth Circuits. Wuchina engaged in mass picketing to obstruct NCF's operations and threatened and attempted to intimidate nonstriking employees exercising their legitimate right to work. Wuchina's actions become even more egregious when placed in the context of the events leading to July 10. Wuchina went to I-22 intending to engage in unprotected activities.[1] Wuchina intended to and did employ excessive force and violent methods to obstruct NCF's operations and to frighten and intimidate the truck drivers.

The court of appeals' opinion that Wuchina did not engage in serious strike misconduct is inconsistent with other portions of the court's opinion. The court of appeals segregated the violence of July 10 into two separate events. During the initial incident, the strikers rushed at the coal trucks, attempted to block the entrance to I-22 and threatened to throw stones at the truck drivers. Further violence and injury were averted by the arrival of the sheriff.

After the sheriff departed the pickets resumed their prior conduct as though they were never interrupted. The pickets raced toward the coal trucks, hurling the stones they previously confined to their hands.

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[1] The ALJ specifically found that Wuchina went to I-22 "upon the urging of the Union and with the intent of putting on a show of force to prevent trucks from entering the facility and thus pressure the Respondent into agreeing to a collective-bargaining contract, in deliberate violation of the court injunction." The ALJ stated that Wuchina's presence at I-22 "was motivated by making a show of force to prevent the facility from operating." App. D at D-9.

The court of appeals did not hesitate in reaching the conclusion that the pickets involved in the second attack stepped beyond the boundary of protected conduct. The court reasoned that the rock throwing incident created a substantial risk of bodily injury which rose to the level of serious strike misconduct. App. A at A-8.

The distinction adopted by the court of appeals is legally insufficient and ignores substantial precedent. The Supreme Court and the circuit courts have adopted a standard which prohibits tactics which are designed to intimidate or threaten nonstriking employees. A crowd of 25 angry pickets bearing weapons in the course of an excessively violent and destructive labor dispute creates an atmosphere of fear and intimidation and presents a grave danger of personal injury and property damage whether or not the weapons are discharged. Individuals exercising their legitimate right to work during a labor dispute may not be subjected to the emotional distress and threat of physical injury which arises when one is confronted by a hostile crowd shouting threats and bearing stones.[2] Striking employees do not have a license to march en masse on and bear instrumentalities of force against nonstriking workers.

The court of appeals judgment cannot be reconciled with the foregoing principles. Based on the prior decisions of the Supreme Court and the other circuit courts, Hans P. Wuchina engaged in serious strike misconduct.

II The Court of Appeals' Decision That NCF Must Reinstate Hans P. Wuchina Conflicts With The Policy Of The National Labor Relations Act.

The policy of the National Labor Relations Act is to encourage the collective bargaining process. *Republic Steel*

[2]The truck drivers who were attacked by the pickets were not employees of NCF. The drivers were employees of an independent trucking company which NCF employed on a regular basis to transport coal. J.A. at 335a. Such employees were completely innocent victims who had no relationship to NCF, the striking or the nonstriking employees or the underlying labor dispute.

Corporation v. N.L.R.B., 311 U.S. 7, 61 S.Ct. 77 (1940). *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. at 256-258, 59 S.Ct. at 496-497. Congress intended that disputes between employers and employees should be resolved in an orderly and peaceful manner, with each side recognizing and honoring the rights of the other.[3]

The National Labor Relations Act defines the employee rights which Congress intended to protect. Section 7 of the Act provides that employees may form or join a labor organization, select a collective bargaining representative and engage in concerted activities for the purpose of collective bargaining. 29 U.S.C. §157.

In furtherance of the foregoing policies, Congress defined the conduct which violates the National Labor Relations Act. Section 8(a) (1) of the Act provides that an employer may not discourage or restrain an employee from joining a labor organization. 29 U.S.C. §158(a) (1). Under Section 8(a) (3), an employer commits an unfair labor practice if he terminates an employee to discourage union membership. 29 U.S.C. §158(a) (3). When an unfair labor practice has been committed, the Board is authorized, under Section 10 of the Act, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 29 U.S.C. §160(c).

No Congressional policy compels the reinstatement of Wuchina. The right of an employee to engage in concerted activities to further the collective bargaining process does not include the concerted activities of the pickets at I-22. The right to strike, as defined by the Supreme Court, encompasses "quit-

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[3]Section 1 of the National Labor Relations Act provides in pertinent part: "It is the purpose and policy of this Act . . . , to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . ." 29 U.S.C. §141(b).

ting of work and statement of grievances in the exercise of pressure." *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. at 256, 59 S.Ct. at 496. Until the decision of the court of appeals in this case, no appellate court has held that the National Labor Relations Act protects employees who conspire to disrupt their employer's operations, who block access to the employer's plant and who threaten to throw stones at nonstriking employees.

Wuchina's conduct at I-22 is the antithesis of the peaceful and orderly procedures which the Act encourages. Employees who are dissatisfied with the terms and conditions of their employment may withhold their services. To insure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. Orders of the Board are subject to review by the courts.

Wuchina and his cohort elected to disregard the administrative and judicial remedies available to them. Having made this choice, Wuchina should be bound by his decision. An employee who rejects the responsibility of proceeding under the law is in no position to invoke the protection of the National Labor Relations Act to maintain his employment.

If permitted to stand, the court of appeals' decision will provide a destructive precedent in the field of labor relations. Collective bargaining and the peaceful resolution of labor disputes will not succeed unless employees as well as employers are compelled to proceed with the statutory remedies. If employees are immune from the consequences of their unlawful conduct during a strike, there is no inducement for an employer to preserve labor peace and negotiate a settlement of the conflict. To compel employers to reinstate employees like Wuchina who attempt to interfere with the employer's business and who threaten to harm nonstriking workers "is to put a premium upon their conduct and to encourage like conduct on

the part of others." *W.T. Rawleigh Co. v. N.L.R.B.*, 190 F.2d at 839.[4]

The fact that this case pertains to the termination of a single employee does not diminish the impact of the court's decision. The activities in which Wuchina participated at I-22 may be repeated by numerous other employees in countless strikes in the future.[5] The need for a standard is clear. Labor unions who organize and encourage their members to employ battlefield tactics on the picket line should be forewarned that the law will not sanction such conduct. Striking employees who threaten to stone nonstriking employees are not entitled to even one precedent to shield their illegal conduct.

III THE COURT OF APPEALS' DECISION THAT THE DISMISSAL OF HANS P. WUCHINA CONSTITUTES AN UNFAIR LABOR PRACTICE CONFLICTS WITH THE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

The dismissal of a striking employee, without more, does not violate the National Labor Relations Act. The gravamen of an unfair labor practice is anti-union animus. An employer may terminate an employee without reprisal, provided such termination is not intended to discriminate against the employee for engaging in activities which are protected under

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[4]In *N.L.R.B. v. Fansteel Metallurgical Corporation*, this Court stated that to justify the use of force and violence against the employer or nonstriking employees because of the existence of a strike "would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." 306 U.S. at 253, 59 S.Ct. at 495.

[5]Wuchina did not act alone during the initial attack on the truck drivers. The ALJ found that approximately 20 to 25 pickets were involved. App. D at D-4. NCF discharged the pickets who the truck drivers and nonstriking employees were able to identify. The circuit court upheld the dismissals, with the exception of Wuchina. The court held that the conduct of the pickets during the initial incident did not amount to serious strike misconduct. *See*, Section I *infra*.

the Act. The Supreme Court has held that the National Labor Relations Act does not interfere with legitimate business decisions. Neither the Board nor the courts may restrict the right of discharge which is exercised for other reasons than intimidation and coercion of employees. *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, 45, 46, 57 S.Ct. 615, 628 (1937); *Firestone Tire & Rubber Company v. N.L.R.B.* 449 F.2d 511, 513, (5th Cir. 1971).

Since the Act contemplates lawful dismissals during a strike, the question of the employer's motivation becomes significant. The court must consider and determine whether or not the employer intended to coerce or discriminate against the discharged employee for participating in the strike. *N.L.R.B. v. Local Union No. 1229,* 346 U.S. 464, 475, 74 S.Ct. 172, 178 (1953).

In her Decision, the ALJ found that Wuchina was not dismissed for engaging in concerted activities under the Act. The ALJ determined that NCF acted on a good faith belief that Wuchina engaged in strike misconduct. App. D at D-8. Adopting the ALJ's finding, the Board held that NCF reasonably held the honest belief that the discharged employees engaged in serious strike misconduct.[6] App. C at C-4.

The court of appeals' opinion ignores the express language of the National Labor Relations Act. The record before the Board discloses an absence of anti-union animus, a necessary element of an unfair labor practice. NCF established and

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[6]The ALJ's finding is well supported by the record. Subsequent to July 10, 1978, Wuchina claimed that he was not involved in the misconduct at I-22. Relying on Wuchina's representations, NCF permitted Wuchina to return to work. At a preliminary hearing on December 7, 1978, the magistrate determined that there was sufficient evidence that Wuchina engaged in criminal conduct. By a letter dated December 8, 1978, NCF notified Wuchina that his employment was terminated "[a]s a result of your involvement in illegal activity which took place at the corporation's coal loading facility on July 10, 1978." J.A. 401a-403a.

the ALJ and the Board found an independent basis for Wuchina's dismissal.

A limited number of circuit courts have stated that an employer may be compelled to reinstate a striking employee who is discharged on the honest, but mistaken belief that the employee engaged in strike misconduct. *N.L.R.B. v. Industrial Cotton Mills*, 208 F.2d 87 (5th Cir. 1953); *Cusano v. N.L.R.B.*, 190 F.2d 898 (3d Cir. 1951). In each of these cases, the Board and the courts have determined that the substantial evidence established that the discharged employee did not engage in the misconduct which was the cause of his dismissal. The mistaken belief of the employer was that the employee participated in the misconduct.

The foregoing cases are, of course, distinguishable from this proceeding involving NCF and Wuchina. There is no dispute that Wuchina engaged in strike misconduct at I-22. The question which has been raised is whether or not the misconduct which admittedly occurred was sufficiently serious to cause Wuchina to forfeit his employee status.

When the mistaken belief of the employer pertains to the legal effect of the undisputed misconduct, the employer should not be penalized when a court determines, after the fact, that such misconduct is not "serious." An order directing the employer to reinstate the employee who engaged in the misconduct is especially unfair when the substantial judicial precedent has established that the particular activities of the discharged employee constitute sufficient reason to terminate.[7]

[7]In *N.L.R.B. v. Industrial Cotton Mills* the court held that the employer must offer reinstatement when the employee is discharged as a consequence of the employer's "blameworthy animus" or his mistake. 208 F.2d at 91. "As between the victim of the mistake and the person who made the mistake, it seems just that the perpetrator bear the onus of his own error rather than the burden of this error be shifted to the employee who cannot guard against it." 208 F.2d at 91. None of the foregoing conditions is present in this case. NCF was exonerated of any blameworthy animus. Wuchina was not the innocent victim of a mistake by his employer, but an active participant in the strike misconduct.

The court of appeals has held that NCF violated the National Labor Relations Act without determining whether or not NCF engaged in an unfair labor practice as defined by the Act. In the alternative, the court of appeals' opinion has established that the employer commits an unfair labor practice by terminating a striking employee, even where the evidence indicates that the termination was not motivated by an anti-union animus. Neither of these results is compatible with the provisions of the Act. When the Board finds, as in this case, that the employee engaged in strike misconduct and that such misconduct was the basis for his dismissal, no unfair labor practice has been committed.

CONCLUSION

For the reasons set forth in this petition, the Supreme Court should grant certiorari to review the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-1381

NORTH CAMBRIA FUEL COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PAUL BAUGHMAN, LOUIS ZILLI, WAYNE CAMPBELL, RONALD SMITH, ROGER SNYDER, NORMAN GORMAN, and DALE BASINGER,
Intervenors.

No. 80-1568

PAUL BAUGHMAN, LOUIS ZILLI, WAYNE CAMPBELL, RONALD SMITH, ROGER SNYDER, NORMAN GORMAN, and DALE BASINGER,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

NORTH CAMBRIA FUEL COMPANY, INC.,
Intervenor.

OPINION OF THE COURT

Before: SEITZ, Chief Judge, ROSENN and SLOVITER, Circuit Judges.

APPENDIX A

North Cambria Fuel Company (NCF) petitions for review of an order of the National Labor Relations Board (the Board) finding NCF guilty of violating section 8(a)(3) and (1) of the National Labor Relations Act by wrongfully discharging Hans Wuchina, a striking employee. Seven former NCF employees (the Baughman group) petition for review of that portion of the Board's order finding that they were lawfully discharged by NCF because they had engaged in serious strike misconduct. The Board cross-petitions for enforcement of its order.

I.

NCF and United Mine Workers of America Local 1880 (the Union) were parties to the National Bituminous Coal Wage Agreement of 1974. When that agreement expired on December 6, 1977, the Union engaged in an economic strike against NCF. The Union returned to work on March 26, 1978, when a new national agreement was reached with the Bituminous Coal Operators Association. NCF, which is not a member of the Association, refused to accept this agreement and continued negotiating with the Union. When an agreement could not be reached, the Union resumed its economic strike.

The strike was marred by violence and vandalism, and NCF obtained two state-court injunctions prohibiting the Union from maintaining more than four pickets at any NCF worksite and enjoining any Union interference with the company's operations. On July 10, 1978, the day after a heated union meeting in which the Union's members were told to put on a "show of force," a group of union members, including Wuchina and the Baughman group, gathered near the entrance to NCF's I-22 coal-loading facility. When six coal trucks approached the facility the union members assembled at the entrance in an attempt to prevent the truckers from entering. The strikers shouted obscenities at the drivers, made obscene gestures, and picked up rocks.

Soon after the strikers blocked the entrance to the I-22 facility, the county sheriff arrived and ordered the strikers to disperse because they were violating a state-court injunction. The strikers moved across the highway and stayed there until after the sheriff left with four of the coal trucks. When the remaining two trucks attempted to leave, the lead truck was attacked by a group of strikers throwing rocks. Some of the rocks hit the truck, breaking its windshield but not causing any injuries.

Following the incident at the I-22 facility, NCF filed contempt charges in state court. The court found the strikers, including Wuchina and the Baughman group, in contempt of court and ordered four strikers not involved in these appeals to pay for the damages to the truck. NCF also brought criminal charges against the strikers, charging them with riot, criminal trespass, and the propulsion of missiles into an occupied vehicle. The Baughman group entered guilty pleas to the reduced charge of disorderly conduct, and their fines were paid by the Union. Following entry of the pleas, NCF's attorney indicated that the guilty pleas could result in discharge because they were admissions of guilt with regard to the violence at I-22. The company subsequently discharged the Baughman-group employees because of their "criminal activity" at the coal-loading facility. Wuchina pleaded not guilty at his preliminary hearing and was bound over for trial. The day after his hearing Wuchina also was discharged by NCF because of his involvement in the incident at I-22. The charges against Wuchina were later dismissed for failure of the state to prosecute.

The discharged employees filed complaints against NCF with the Board. After a hearing, the administrative law judge (ALJ) concluded that NCF had violated section 8(a)(3) and (1) of the National Labor Relations Act by discharging the employees because they had been engaged in protected strike activity. The Board agreed that Wuchina's discharge was

wrongful, but it overturned the ALJ's finding that the Baughman group had not engaged in serious strike misconduct. The Board found that Wuchina left the I-22 facility when the sheriff ordered the strikers to disperse, but it concluded that the Baughman group had remained and was present during the rock-throwing incident.

II.

A. *NCF Petition*

NCF first argues that the record does not support the Board's finding that Wuchina left the I-22 facility after the sheriff ordered the strikers to disperse. We must, of course, uphold the Board's finding if it is "supported by substantial evidence on the record considered as a whole." 29 U.S.C. §160(e) & (f) (1976); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). NCF directs our attention to evidence indicating that Wuchina not only remained at the I-22 facility but also participated in the rock-throwing incident. Nevertheless, we find that the Board's finding is supported by substantial evidence on the record. For example, Wuchina's testimony that he left the loading facility when the sheriff arrived was corroborated by the testimony of two other strikers, and a third union member testified that he saw Wuchina at a local ice cream stand fifteen minutes after Wuchina testified that he left I-22 and twenty minutes before the other strikers began to arrive. In addition, Wuchina was the only striker who pleaded not guilty to the criminal charges, and NCF allowed Wuchina to return to work after he signed a statement that he had not been involved in the violence at the coal-loading facility. Although the evidence presented at the hearing was conflicting, our review of the record indicates that the evidence supporting the Board's finding is not "overborne by evidence calling for contrary inferences." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S.Ct. 453, 455, 95 L.Ed. 479 (1951).

Moreover, the ALJ made specific credibility determinations to support her finding that Wuchina left the I-22 facility before the rock-throwing incident. The ALJ emphasized that Wuchina's testimony was persuasive because he had been more candid about the events of July 9 and 10 than the other union witnesses and had made various admissions concerning those events. These findings were adopted by the Board. NCF asks this court to overturn these credibility determinations because they are "based on an inadequate reason, or no reason at all." *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978). This court, however, will not disturb the credibility findings of an ALJ as long as the ALJ considers all relevant factors and sufficiently explains his or her resolutions. *See NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 526 n. 14 (3d Cir. 1977). In this case, the ALJ fully explained her credibility findings, and these explanations show that she considered various factors relevant to credibility, such as demeanor, admissions, and self-interest.

NCF contends that even if Wuchina was not present at the I-22 facility during the rock-throwing incident, "his actions before the sheriff's arrival constituted serious strike misconduct justifying termination of his employment." NCF disputes the ALJ's finding that Wuchina's only misconduct was crossing the road with the other strikers and congregating at the entrance to the loading facility in violation of the state-court injunction. Wuchina's testimony that he did not threaten or harass the truck drivers is "not believable" according to NCF. The ALJ, however, apparently credited Wuchina's testimony in this regard, and we hold that substantial record evidence supports this finding.

NCF argues, however, that even if Wuchina did not use obscenities or attempt to provoke or threaten the truck drivers, his discharge was lawful because he aided and abetted fellow strikers who engaged in such strike misconduct. Union

members who actively cooperate with strikers engaged in serious misconduct are equally culpable. *See, e.g., W. J. Ruscoe Co. v. NLRB*, 406 F.2d 725 (6th Cir. 1969); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967); *cf. NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 373 (1939) (union members who delivered food and supplies to sitdown strikers occupying plant were aiders and abettors). However, even assuming that Wuchina's participation in the blocking of the facility's entrance is sufficient to show that he actively cooperated with the strikers who provoked and harassed the truck drivers before the sheriff's arrival, his discharge was not lawful unless the actions of those strikers amount to serious strike misconduct. The ALJ found that these strikers shouted obscenities, used obscene gestures, picked up rocks, and attempted to provoke the truck drivers. NCF maintains that the case law demonstrates that these actions constitute serious misconduct because strikers have no right to intimidate nonstriking employees or to interfere with the employer's operations. The Board and the intervenors distinguish the cases relied on by NCF, arguing that they involved "substantially more egregious conduct" than that which occurred prior to the sheriff's arrival.

In *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3d Cir. 1939), *modified on other grounds*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940), this court stated that Congress must have contemplated that the protection of the National Labor Relations Act would extend to employees who commit minor acts of misconduct while exercising their right to strike. This court subsequently has found that the following do not constitute serious strike misconduct: a minor scuffle amounting at most to disorderly conduct, *see NLRB v. Buitoni Food Corp.*, 298 F.2d 169 (3d Cir. 1962); abusive, vulgar and profane language, *see McQuaide*, 552 F.2d 519, and ambiguous threats, *see id.* The actions of the strikers before the sheriff's arrival fit within these cases. There was neither any violence nor any damages or

injuries. Although the strikers used obscenities and attempted to provoke the truck drivers, these actions are not serious strike misconduct. In addition, interference with the employer's operations was slight and lasted only for a short time, and the strikers stopped blocking the entrance to the facility as soon as the sheriff arrived. The Board is entitled to deference in drawing the line between strike misconduct and protected activity. Therefore, we uphold the Board's conclusion that the actions of the strikers before the sheriff's arrival did not constitute serious strike misconduct.

Finally, NCF argues that the Board abused its discretion by ordering it to pay twelve percent interest on back wages owed to Wuchina. NCF contends that this interest rate is improper because it bears no relation to the loss sustained by an employee who has not had the use of his money, does not reflect the cost of money to the average consumer, and exceeds the six percent legal rate of interest in Pennsylvania, which more closely approximates the interest rate paid on bank savings accounts. The Board, however, has broad discretion in fashioning remedies, and this discretion extends to the imposition of an interest rate. *See Local 777, Democratic Union Organizing Committee, Seafarers International Union v. NLRB*, 603 F.2d 862, 891 n. 84 (D.C. Cir. 1978). The interest rate imposed by the Board reflects an employer's cost of borrowing. Therefore, it is rationally related to the Board's objective of discouraging employers from "borrowing" from employees instead of paying backpay awards promptly. Furthermore, the legal rate of interest in Pennsylvania has no bearing on what interest rate is appropriate to effectuate the goals of federal labor legislation. Thus, we hold that the Board did not abuse its discretion by imposing a twelve percent interest rate on the backpay award.

B. *Baughman Group Petition*

The seven employees in the Baughman group challenge the Board's finding that they engaged in serious strike miscon-

duct justifying termination of their employment. They contend that their actions at the I-22 facility did not constitute serious strike misconduct as a matter of law. The Board's factual findings with respect to the Baughman group, which are not contested, are as follows: They went to the I-22 facility in response to the Union's call for a "show of force;" they participated in the initial blocking of the facility with approximately twenty other union members; one of them admitted picking up a rock and testified that "everybody else picked up a rock;" some of them shouted obscenities at the truck drivers; they did not leave I-22 after the sheriff ordered the strikers to disperse; they were in the group of fifteen strikers who remained across the road from the facility's entrance and attacked the coal trucks with rocks after the sheriff left; they were held in contempt of the state-court injunction; and they pleaded guilty to disorderly conduct charges.

Unlike the activities at the I-22 facility before the sheriff's arrival, the rock-throwing attack rises to the level of serious strike misconduct. The strikers present engaged in violence that created a substantial risk of bodily injury and caused property damage. In addition, these strikers pleaded guilty to criminal charges stemming from this incident. We find that the actions of the strikers who remained after the sheriff's arrival would "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *McQuaide*, 552 F.2d at 528.

The Baughman-group employees appear to rest their argument on the fact that the Board did not establish that they, as opposed to the other strikers, actually threw the rocks. However, as noted earlier, union members who actively cooperate with strikers engaged in serious strike misconduct are equally culpable. Active cooperation has been shown here. The Baughman group constituted one-half of the strikers remaining after the sheriff ordered the union members to disperse, and

they crossed the road with the other strikers as the remaining coal trucks attempted to leave. The Board found that at least twenty rocks thrown by this group of fifteen strikers hit the truck in a very short time. Moreover, the guilty pleas to the criminal charges also support a finding that the Baughman group participated in and supported the strike misconduct. Therefore, the Board did not err in concluding that the employees in the Baughman group had engaged in serious strike misconduct.

The Baughman group also contends that the Board erred in placing upon the General Counsel the burden of establishing that the strikers had not engaged in serious misconduct. In placing this burden upon the General Counsel, the Board cited its decision in *Ohio Power Co.*, 215 NLRB No. 133 (1975). *Ohio Power* provides that if the employer shows that it reasonably held an honest belief that an employee engaged in serious strike misconduct, the General Counsel must show that such misconduct did not occur. The Baughman group argues that this procedural rule is improper because it "deprives employees of statutory rights without an affirmative showing of wrongdoing." The Baughman group apparently contends also that this rule in effect establishes a good faith defense for an employer and requires the General Counsel to rebut the employer's good faith.

The Board, however, did not require the General Counsel to rebut NCF's good faith belief, but only to bear the burden of proving that the strikers had not engaged in serious misconduct. It is settled that the burden of proving a violation of the National Labor Relations Act is on the General Counsel. *See, e.g., Arthur L. Morgan Union, Local 3 v. NLRB*, 463 F.2d 818, 819 n. 3 (D.C.Cir. 1972); *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976, 979 (8th Cir. 1970); *cf. 29* U.S.C. §160(c) (1976) (Board must dismiss complaint unless it finds upon preponderance of evidence unfair labor practice has been committed).

Because the General Counsel must establish the essential elements of an unfair labor practice, it is not incorrect to require that the General Counsel prove that employees have not engaged in serious strike misconduct justifying their discharge. As a result, the procedural rule imposed by the Board in this case does not conflict with the provisions of the National Labor Relations Act or improperly deprive employees of protected rights. *See Dallas General Drivers, Local 745 v. NLRB*, 389 F.2d 553 (D.C.Cir. 1968); *NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495 (5th Cir. 1966).

III.

The petitions for review of the order of the Board will be denied. The Board's cross-petition for enforcement of its order will be granted.

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-1381

NORTH CAMBRIA FUEL COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PAUL BAUGHMAN, LOUIS ZILLI, WAYNE CAMPBELL, RONALD SMITH, ROGER SNYDER, NORMAN GORMAN, and DALE BASINGER,
Intervenors.

No. 80-1568

PAUL BAUGHMAN, LOUIS ZILLI, WAYNE CAMPBELL, RONALD SMITH, ROGER SNYDER, NORMAN GORMAN, and DALE BASINGER,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

NORTH CAMBRIA FUEL COMPANY, INC.,
Intervenor.

JUDGMENT

Before: SEITZ, Chief Judge, ROSENN and SLOVITER, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by North Cambria Fuel Company, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on February 26, 1980, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on January 12, 1981, and has considered the briefs and transcript of record filed in this cause. On April 10, 1981, the Court issued an Order grantipg the Board's cross-petition for enforcement and denying the petitions for review.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, its officers, agents, successors, and assigns, abide by and perform the direction of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

BY THE COURT

/s/ SEITZ
Chief Judge

DATED: June 12, 1981

APPENDIX C
FJT

247 NLRB No. 176 D-6110
Blairsville, PA

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

NORTH CAMBRIA FUEL COMPANY, INC.

and Case 6—CA—11901

HANS P. WUCHINA, an Individual

and Case 6—CA—12013

PAUL G. BAUGHMAN, an Individual

and Case 6—CA—12127

LOUIS T. ZILLI, an Individual

DECISION AND ORDER

On July 11, 1979, Administrative Law Judge Almira Abbot Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.[2]

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[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2]In Par. 1(b) of her recommended Order, the Administrative Law Judge uses the broad cease-and-desist language, "in any other manner." However,

(continued)

The Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) of the Act by terminating economic strikers Dale Basinger, Paul Baughman, Wayne Campbell, Norman Gorman, Ronald Smith, Roger Snyder, Hans Wuchina, and Louis Zilli. In doing so, the Administrative Law Judge concluded that Respondent had not met its burden of showing that the terminated strikers had engaged in serious strike misconduct. Based on the Administrative Law Judge's finding that striker Wuchina was not present when the violence occurred, we agree that Respondent's subsequent discharge of Wuchina was unlawful. However, we find merit in Respondent's exceptions to the Administrative Law Judge's findings concerning the seven other strikers terminated by Respondent.

FACTS

The Union called a strike on May 16, 1978,[3] when Respondent refused to accept the new United Mine Workers contract. The strike was marked by violence. On June 6, the Pennsylvania Courts of Common Pleas of Indiana and Westmoreland Counties issued an injunction restraining the Union and its members from picketing the entrance to Respondent's facility on the north side of I-22. Thereafter, the Union held a meeting on July 9, which was attended by 35 to 40 members, including at least 7 of the strikers involved here. The meeting was boisterous, the members were angry, and orders were given to "get as many pickets there as we can," and to put on a "show of force."

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we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we shall modify the recommended Order so as to use the narrow injunctive language "in any like or related manner."

[3]All dates herein are in 1978, unless otherwise indicated.

The following morning, all of the alleged discriminatees went to Respondent's I-22 loading facility along with about 25 other union members. When six trucks loaded with coal approached the entrance, Zilli, Smith, Wuchina, Basinger, and many others, who had assembled on the south side of I-22, crossed the highway because they wanted to stop the trucks from entering the premises.[4] Most, if not all, of the strikers picked up rocks, shouted vulgarities, and made obscene gestures at the drivers. At this point, the sheriff arrived and informed the men that they were acting in violation of the court injunction. All the union members immediately left the entrance and crossed back to the south side of I-22. Wuchina got in his car, drove away from the area, and did not return. Shortly thereafter, the sheriff drove out of the facility followed by four of the trucks which had dumped their cargo. When the other two trucks approached the entrance a few minutes later, the remaining 7 alleged discriminatees were among about 15 strikers who returned to the south side of I-22. Some of these strikers threw rocks at the first truck, breaking its windshield.

All eight alleged discriminatees were among those strikers found in contempt of the Indiana County Court injunction. On October 7, seven of the alleged discriminatees entered guilty pleas to disorderly conduct charges. The charges against Wuchina, who pled not guilty, were later dismissed for failure to prosecute. The county court found four other strikers, not involved herein, guilty of throwing rocks at the truck and ordered them to pay damages. They were subsequently discharged.

On November 16, Respondent dismissed seven of the alleged discriminatees for engaging in "illegal criminal conduct" at its I-22 loading facility. Wuchina returned to work in

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[4]Gorman, Baughman, Snyder, and Campbell were among a small group of employees who had taken up positions on the north side of I-22, at the entrance of the facility.

September but was discharged by Respondent on December 8, for his alleged serious strike misconduct.

Contrary to the Administrative Law Judge, we find that Respondent reasonably held the honest belief that these individuals engaged in serious strike misconduct and that, with respect to all these individuals other than Wuchina, the General Counsel failed to show they did not engage in such misconduct. Thus, the record shows that they were on the scene pursuant to the Union's exhortation to put on a "show of force." Furthermore, they picked up and threatened to throw rocks at six trucks entering Respondent's premises until a local sheriff informed them that they were acting in violation of a court injunction and ordered them to disperse. Only a few minutes later, after the sheriff's departure, these same individuals were identified as among a group of 15 or so strikers who returned to Respondent's premises, where some of the group threw a barrage of rocks at a truck and broke its windshield. Subsequently, these same individuals were found in contempt of the court injunction, and later entered guilty pleas to the charge of disorderly conduct. The General Counsel tried the case on the theory that the seven strikers were not present at the scene of the misconduct after they were ordered to disperse, but the Administrative Law Judge did not credit this testimony, except for Wuchina. On this evidence we find that the General Counsel has failed to meet his burden of establishing that the alleged discriminatees, other than Wuchina, did not engage in serious strike misconduct.[5] Accordingly, we shall dismiss these allegations of the complaint concerning these alleged discriminatees.

Conclusion of Law

1. North Cambria Fuel Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[5] *Ohio Power Company*, 215 NLRB 862 (1974).

2. United Mine Workers of America, Local 1180, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily terminating and refusing to reinstate Hans Wuchina because of his union activities, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, North Cambria Fuel Company, Inc., Spangler, Pennsylvania, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Terminating strikers, or otherwise discriminating against employees, to discourage membership in United Mine Workers of America, Local 1180, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Hans Wuchina immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered due to the discrimination practiced against him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Com-*

pany, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation*, 231 NLRB 657 (1977).[6]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, and personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Blairsville, Pennsylvania, facility on I-22 and at its principal office in Spangler, Pennsylvania, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[6]See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the remaining allegations of the complaint be, and they hereby are, dismissed in their entirety.

Dated, Washington, D.C. February 26, 1980

.....

John H. Fanning, *Chairman*

.....

John C. Truesdale, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, Dissenting in part:

Contrary to my colleagues in the majority, I would adopt the Decision of the Administrative Law Judge in its entirety. The Administrative Law Judge correctly held that the issue is whether any misconduct engaged in by the eight employees found by her to have been discharged in violation of Section 8(a)(3) was sufficiently serious to deprive them of the protection which the Act affords to economic strikers. I agree with the Administrative Law Judge that Respondent discharged seven of those strikers[8] because of a good-faith belief that they had engaged in "illegal criminal conduct" by being in the company of other strikers, some of whom threw rocks at a moving truck thereby damaging it and endangering the driver. I do not find it necessary to pass on Respondent's characterization of the offending conduct though I do note, as does the majority, that the seven strikers did plead guilty in state court to charges of disorderly conduct. This was presumably for their violation of a court injunction against massed picketing and in picking up and *threatening* to throw rocks. I especially note,

[8] I agree with the majority that Respondent unlawfully discharged Hans Wuchina based on the Administrative Law Judge's findings that he had left the area before any rocks were thrown.

and call to the attention of my colleagues, that since four other strikers were found guilty of inflicting the damage on the truck and were ordered to pay restitution the actual rock throwers must thereby have been identified to Respondent's satisfaction. The discharges of these four strikers, appropriately enough, were never the subject of any 8(a)(3) complaint.

The majority's reliance on *Ohio Power Company, Supra,* is misplaced. There is no dispute that Respondent's decision to discharge the seven strikers whom I would find to be discriminatees was explicitly based on their presence with the rock throwers. There is thus no need for the General Counsel to carry the burden of showing, in the face of Respondent's good-faith belief, that this degree of misconduct did not occur. I stress that there is no evidence in the record that any of the seven strikers consented to any rock throwing by others.

While I do not condone the overall behavior of the seven strikers, I do not view it as sufficiently serious to justify their termination, given the lack of any showing of complicity in acts with serious potential for personal injury or property damage.[9] Admittedly, I draw a fine line here separating protected from unprotected behavior. I would find, however, under the circumstances of this case, that while that line may have been approached, it was not crossed. Accordingly, I would affirm the Administrative Law Judge in her finding that all eight strikers named in the complaint were discharged in violation of Section 8(a)(3).

Dated, Washington, D.C. February 26, 1980

.....

Howard Jenkins, Jr., *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[9] *MP Industries, Inc., et al.*, 227 NLRB 1709 (1977).

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT terminate strikers or otherwise discriminate against the employees to discourage membership in United Mine Workers of America, Local 1880, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Hans Wuchina immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered due to our discrimination against him, with interest.

NORTH CAMBRIA FUEL COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

APPENDIX D

JD-495-79
Spangler, PA

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NORTH CAMBRIA FUEL COMPANY, INC.

and

HANS P. WUCHINA, An Individual — Cases 6-CA-11901
6-CA-12013

PAUL G. BAUGHMAN, An Individual — 6-CA-12127

LOUIS T. ZILLI, An Individual

Donald C. Burns, Esq.
for the General Counsel
John Bonya, Esq. and *Joseph Mack, Esq.*
(Mack & Bonya), of Indiana, PA,
for the Respondent.

DECISION

Statement of the Case

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This case was heard in Indiana, Pennsylvania, June 5 and 6, 1979. A copy of the charge filed by Hans P. Wuchina in Case 6-CA-11901 was served on the Respondent December 20, 1978. The original charge filed by Paul G. Baughman in Case 6-CA-12013 was served January 30, 1979; the amended charge in that case was served February 28, 1979; and the second amended charge was served April 30, 1979. The charge in Case 6-CA-12127, filed by Louis T. Zilli, was served on the Respondent March 5, 1979. An amended consolidated com-

plaint and notice of hearing, and an order further consolidating cases were issued April 30, 1979. The amended consolidated complaint was duly answered by the Respondent.

The issue is whether or not the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act as amended by terminating eight economic strikers. For the reasons fully set forth below, I conclude that the termination of the strikers was unlawful, as alleged in the complaint.[1]

Upon the entire record, including the demeanor of the witnesses, the stipulation of fact entered into by the parties, the oral arguments, and the brief submitted by the Respondent, I make the following:

Finding of Fact
and
Conclusions of Law[2]

I. Unfair Labor Practices[3]

A. *Background*

The Respondent is engaged in providing labor for strip mines at various locations in Pennsylvania. It admits and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: President Jessie Jolly, Vice President Girard Bloom, Superintendent Fritz Strittmatter, and Engineer Dale Henigin.

[1]There is no merit to the Respondent's contention that no violations of the Act can be found with respect to those strikers who did not themselves file unfair labor practice charges with the Board. See *N.L.R.B.* v. *Anchor Rome Mills, Inc.*, 228 F.2d 775 (C.A. 5); *Cathey Lumber Co.*, 86 NLRB 157 enfd. 185 F.2d 1021 (C.A. 5); *Montgomery Ward and Co.*, 9 NLRB 538, 540.

[2]No issue is raised as to jurisdiction. The complaint alleges, the answer admits, and I find that the Respondent meets the Board's standard for the assertion of jurisdiction in this proceeding. The Respondent also admits, and I find, that United Mine Workers of America, Local 1880, herein called the Union, is a labor organization within the meaning of Secion 2(5) of the Act.

[3]Except where credibility is specifically discussed, the evidence is substantially undisputed.

On December 6, 1977, the National Bituminous Coal Wage Agreement, to which the Respondent and United Mine Workers of America, were parties, expired, and the Union struck. The Respondent began operations on March 26, 1978, when the Association (of which the Respondent was not a member) and UMWA reached a new agreement. Although the Respondent refused to accept the new agreement, it continued negotiations and operations until May 16, 1978 when the Union struck the Respondent. The strike, in which Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman, Dale Basinger [Bassinger] and Hans Wuchina participated, and which is still in progress, was marked by violence. Thus, $35,000-$50,000 worth of damage was inflicted on machines located at the Respondent's New Alexandria, Pennsylvania site; $11,000 worth of damage was done to equipment, and a building and the paperwork it contained were destroyed at the Respondent's Blairsville location on I-22. Although reported to the State police, no arrests were made. Other incidents included an assault on a supervisor at I-22 picket line, and truck and bulldozer radiators and windshields' being shot out.

On June 6, 1978 an injunction was issued against the Union by the Courts of Common Pleas of Indiana and Westmoreland Counties restraining the Union and its members from, among other things, picketing the Respondent's I-22 loading facility and certain other facilities with more than four pickets at one time.

On July 9, 1978, the day before the events in issue in these cases, striker Eugene Hudson, Jr. struck Vice President Girard Bloom, cutting his forehead, and was discharged; and the Respondent's loading facility in Brush Valley Township was burned to the ground resulting in about $18,000 damage. The same day, the Union held its weekly Sunday meeting which was attended by 35 to 40 members, including 7 of the strikers

involved herein.[4] The meeting was boisterous, the members were angry, and orders were given to "get as many pickets [out] there as we can," to put on a "show of force," and "to keep the trucks from coming in and for North Cambria Fuel to sign a contract."[5]

B. *Events of July 10, 1978*

All of the alleged discriminatees went to the Respondent's I-22 loading facility on the morning of July 10. Gorman and Baughman, who had been assigned picket duty, took up positions on the north side of I-22, at the entrance to the facility. Snyder and Campbell also proceeded to the entrance. Zilli, Smith, Wuchina, and Basinger assembled with 20-25 other men on the south side of I-22 across from the entrance. Wuchina testified that he heard some talk about throwing rocks and that he was asked if he was going to throw any but he believed he replied he was not going to. When six trucks loaded with coal, led by President Jolly, were observed approaching the entrance, Zilli, Smith, Wuchina, Basinger, and many others crossed to the north side because, Basinger, Smith, and Zilli said, although they knew it was a violation of the injunction, they were upset that the facility was working and they wanted to stop the trucks from coming in. Basinger admitted he picked up a rock, and testified that "everybody else picked up a rock."[6] Some of the pickets shouted vulgarities and provocations, and made obscene gestures at the drivers; Baughman, Smith, Gor-

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[4]Based on the credited testimony of Wuchina, Baughman, Smith, and Snyder, over denials by Zilli and Basinger that they attended and Campbell's testimony that he could not remember whether or not he attended. Gorman could also not remember, but there is no evidence he did attend.

[5]Based on the testimony of Wuchina, corroborated by Snyder. Because of the admissive nature of this testimony, I credit it over the denials of Baughman, Smith and Campbell that any call for mass picketing or show of force was issued.

[6]I credit this admissive testimony over that of other alleged discriminatees that they saw no picket with rocks.

man, Zilli, Campbell, Snyder, and Basinger called them s.o.b.'s and scabs.[7] However, before any violence occurred, the sheriff arrived and all pickets put down their rocks.[8] The sheriff informed the men they were in violation of the injunction and ordered all but four pickets to disperse. All eight discriminatees were among the men who left the entrance immediately and crossed back to the south side of the road. The six trucks entered the premises and dumped their loads. Shortly thereafter the sheriff drove out of the facility followed by four of the empty trucks, without incident. A few minutes later, the two trucks remaining on the premises, the first of which was driven by Daniel Boring, followed by a pickup driven by Vice President Bloom, approached the entrance on their way out, when Boring met with a barrage of rocks, many of which struck his truck and some of which broke his windshield.

Boring identified Baughman, Smith, Gorman, Zilli, Campbell, Snyder, and Basinger as being in the group of rock throwers, although he could not say that any of them threw rocks. Boring identified Wuchina as a rock thrower. Bloom testified that he was not in the position to see the rock throwing, but that he immediately pulled around Boring's truck where he saw the above-named eight men running across the road north to south. I credit the testimony of Boring and Bloom as to all the alleged discriminatees except Wuchina. Boring was a disinterested witness, employed by a contract trucker otherwise unrelated to the Respondent, with nothing to gain by lying about these matters.

Although he was not acquainted with the seven discriminatees at the time of the incident, he identified them shortly thereafter from photographs taken by the Respondent of pickets before the sheriff arrived. Accordingly, although he could no longer identify or describe these men at the time of the

[7]Based on the testimony of President Jolly and Vice President Bloom, which I credit as plausible in the light of all the other credited evidence.

[8]Based on the credited testimony of Basinger.

hearing, I find that he observed them in the group of rock throwers and recognized their pictures shortly thereafter. Bloom knew them by sight, and he impressed me as an honest person capable of accurate observation and recall, and I believe he told the truth in this instance. By contrast, the testimony of the witnesses for the General Counsel was so riddled with inconsistencies and they purported to be so unbelievably unaware or uninterested in this violent incident that I can only conclude that they were more concerned with avoiding what they feared might be the consequences of their conduct than they were with telling the truth. In making this credibility resolution, I have also taken into consideration the fact that these employees plead guilty to a reduced charge of disorderly conduct after the Respondent filed criminal charges against them for allegedly engaging in a riot, criminal trespass, and propulsion of missiles into an occupied vehicle, based on the events of July 10. Although they attributed their pleas to matters having nothing to do with their guilt or innocence of the charges, Roger Snyder acknowledged he was guilty of misconduct, and I cannot believe any of them would have so plead if they had been confident that their conduct was above reproach.

With regard to Wuchina, Vice President Bloom acknowledged that he could have testified, at the unemployment-compensation hearing, that he could not remember whether he saw Wuchina leave the area before or after the rock-throwing incident. Moreover, the Respondent granted Wuchina's request to return to work on September 13, 1978 upon his signing a sworn statement that he had engaged in no violence. This seems to indicate that the Respondent, at that time, had more confidence in Wuchina's denial than in Boring's identification of him as being involved in the incident. Wuchina's denial of being involved in the violence was more persuasive than those of the other General Counsel witnesses, he was more candid than they as to other matters, and he alone of this group

plead not guilty to criminal charges subsequently filed against them by the Respondent. In view of these considerations and the weaknesses in the identification of Wuchina compared with that of the other alleged discriminatees, I credit Wuchina, even though he was denied unemployment compensation on the ground that he threw a stone at Boring's truck, and find that he left the area before any rocks were thrown, as he testified.

The eight alleged discriminatees and others were found in contempt of the Indiana County Court injunction and they were banned from all the Respondent's facilities except under specific circumstances; four other pickets, not involved herein, were ordered, in addition, to pay for the damage to the truck, and were subsequently discharged.

As indicated, the Respondent filed charges of riot, criminal trespass, and propulsion of missiles into an occupied vehicle against the discriminatees and others. On October 17, 1978 all except Wuchina entered pleas of guilty to the reduced charge of disorderly conduct, and were fined $100 plus $26 costs which fines, as far as this record shows, were paid by the Union. Wuchina plead not guilty to the original charges and was bound over for trial; the charges against him were subsequently dismissed for failure of the Commonwealth to proceed against him within a reasonable time.

By letters dated November 16, 1978, the Respondent dismissed Zilli, Campbell, Smith, Snyder, Gorman, Basinger and Baughman for the stated reason of "illegal criminal activity relative to an incident which took place on July 10, 1978 at the I-22 Loading Facility." A letter dated December 8, 1978 dismissed Wuchina for the stated reason of his "involvement in the illegal activity which took place at the corporation's loading facility on July 10, 1978."

President Jolly and Vice President Bloom testified that Zilli, Campbell, Smith, Snyder, Gorman, Basinger, and

Baughman were terminated because of the observations of Bloom, Jolly and Boring of their conduct on July 10, and because of their pleas of guilty to disorderly conduct; and that Wuchina was terminated because of the reports of Bloom, Jolly, and Boring and because he was bound over for trial on the original criminal charges.

B. *Conclusions*

The Respondent contends that its termination of these strikers was not violative of Section 8(a)(3) because they were not terminated for striking, but because the Respondent honestly believed, based on the eyewitness accounts of Jolly, Bloom and Boring and the guilty pleas to charges of disorderly conduct, which clearly establishes, that these strikers engaged in serious acts of violence in that Wuchina actually threw a rock at Boring's truck, and the others were in the group of strikers who stoned the truck thereby participating in and aiding and abetting the violence.

It is clear, and I find, that these employees were not terminated for striking, and I accept the Respondent's contention that it acted on a good faith belief that all of these strikers, including Wuchina with respect to whom the evidence on this matter is somewhat weaker, engaged in strike misconduct. Good faith belief is not enough, however, unless it is affirmatively shown that the terminated strikers in fact engaged in misconduct, and not all misconduct in the course of a strike justifies termination.[9] It is established Board law that only "a striker's actual serious misconduct during a strike" warrants his termination[10] and "the mere fact that an employee was in the company of another employee who commits an act of misconduct will not taint the first employee, without a showing

[9]See *Associated Grocers of New England, Inc.*, 227 NLRB 1200, 1207, enforced, reversed, and remanded in part 562 F.2d 1333 (C.A. 1).

[10]*Advance Industries Division-Overhead Door Corporation*, 220 NLRB 431, 438.

of complicity on the part of that employee in the wrongful activity."[11]

Having considered all the evidence, I cannot find that any of these employees actually engaged in misconduct sufficiently serious to meet the Board's standard for justifying termination of a striker.

Thus, the evidence shows that these strikers appeared at the Respondent's I-22 loading facility on July 10, upon the urging of the Union and with the intent of putting on a show of force to prevent trucks from entering the facility and thus pressure the Respondent into agreeing to a collective-bargaining contract, in deliberate violation of the court injunction limiting the number of pickets to four. Most of them assembled across the road from the entrance to the facility with 20-25 other strikers where there was talk about throwing rocks at any trucks which might try to enter. When trucks were observed approaching the entrance to the facility, they, with other strikers, crossed the road to the entrance because they were upset that the facility was working and they wished to stop the trucks from coming in.

This is the only misconduct in which Hans Wuchina engaged. Although his presence, like the presence of the other strikers, was motivated by making a show of force to prevent the facility from operating, the Respondent does not contend that engaging in mass picketing in violation of the court injunction was a factor in its decision to terminate these strikers, and I have found that Wuchina left the area when ordered to do so by the sheriff, and threw no stones at the trucks. I therefore find that Wuchina engaged in no serious misconduct, and conclude that his termination on December 8, 1978 was a violation of Section 8(a)(3) and (1) of the Act.

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[11] *MP Industries, Inc. et al.* 227 NLRB 1709, 1710.

The others picked up rocks as they crossed the road, and shouted vulgarities and provocations at the drivers of the trucks. When the sheriff arrived, they laid down their rocks and went back across the road. The six trucks entered and dumped their loads, and four left under escort by the sheriff, without incident. Then, when the two remaining trucks started to leave the facility, the seven other strikers here involved joined a group of strikers some of whom threw rocks at the lead truck, damaging its windshield.

As I understand Board law, shouting vulgarities and provocations and picking up rocks without throwing them is not conduct which the Board considers sufficiently serious to warrant discharge.[12] Nor has the Board ever, to my knowledge, found that the termination of a striker is justified on the basis of being a member of a group, other members of which engaged in violence, in the absence of evidence that the terminated employees themselves engaged in the violence. Although the decision of these strikers to plead guilty to the charge of disorderly conduct may well have reinforced the Respondent's good faith belief that they engaged in strike misconduct, it is not conclusive evidence that they engaged in misconduct of sufficiently serious nature to justify their termination. The charge of disorderly conduct has been described as,

> A term of loose and indefinite meaning (except as occasionally described by statutes), but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality.[13]

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[12]See *Moore Business Forms, Inc.*, 224 NLRB 393, 405, reversed in part 574 F.2d 835 (C.A. 5); *Trumbull Asphalt Company of Delaware*, 139 NLRB 122, reversed in part 327 F.2d 841 (C.A. 8).

[13]Black's Law Dictionary, Fourth Edition, page 556.

This definition does not, of course, conform with Board standards as to strike conduct justifying termination. The Respondent has not suggested that disorderly conduct is otherwise defined by statutes of Pennsylvania, and this record does not show that the strikers' plea encompassed anything more definite than the definition set forth or anything more serious than the conduct found herein, if that. It is not the plea, or the conviction, that counts here, but "what the conduct actually was."[14] In these circumstances, it does not signify that the Respondent followed a policy of discharging all strikers who engaged in violence nor that its counsel informed these strikers, when they entered guilty pleas, that discharge might result.

I conclude that the termination of strikers Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman, and Dale Basinger on November 16, 1978 for misconduct on the picket line was not justified under Board law, and was violative of Section 8(a)(3) and (1) of the Act, as alleged in the complaint.[15]

II. Remedy

Having found that the Respondent committed certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom, and because of the nature of the violations found to cease and desist from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also

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[14]Cf. *Markle Manufacturing Company of San Antonio*, 239 NLRB No. 168, p. 25.

[15]The Respondent has called to my attention several cases, including some of those cited above, in which Courts of Appeals have found, contrary to the Board, that conduct similar to that engaged in by the strikers here involved justified termination of strikers. I am, however, required to follow the Board. *Iowa Beef Packers, Inc.*, 144 NLRB 615. The Board has not, to my knowledge, applied the ruling of the Supreme Court in *N.L.R.B.* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, justifying the discharge of aiders and abettors of sit-down strikers to picket line misconduct.

recommend that the Respondent take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman, and Dale Basinger on November 16, 1978, and Hans Wuchina on December 8, 1978, I recommend that Respondent offer them immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings suffered by reason of the Respondent's unlawful conduct against them, in accord with the Board's decision and order and *Abilities and Goodwill, Inc.*, 241 NLRB No. 5. Backpay shall be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289. Interest shall be paid on all backpay due. *Florida Steel Corporation*, 231 NLRB 651; *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[16]

ORDER

The Respondent, North Cambria Fuel Company, Inc., Spangler, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating strikers, or otherwise discriminating against employees to discourage membership in United

[16]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Mine Workers of America, Local 1180, or any other union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman, Dale Basinger, and Hans Wuchina, immediate and full reinstatement to their jobs or if their jobs are no longer available to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make aforementioned employees whole for their lost earnings in the manner set forth in the Remedy section of this Decision.

(b) Preserve, and upon request make available to the Board or its agents for examination and copying all payroll, social security payment, and personnel records and reports, timecards, and all records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at its Blairsville, Pennsylvania facility on I-22 and at its principal office in Spangler, Pennsylvania, copies of the attached notice.[17] Copies of the notice on forms provided by the Regional Director of Region 6, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent imme-

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[17]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

diately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this recommended Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. July 11, 1979.

/s/ ALMIRA A. STEVENSON

Almira A. Stevenson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

WE WILL NOT terminate strikers or otherwise discriminate against employees to discourage membership in United Mine Workers of America, Local 1880, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman, Dale Basinger, and Hans Wuchina immediate and full reinstatement to their former jobs, or if their jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges; and make them whole for any loss of pay they may have suffered as a result of the discrimination against them, plus interest.

NORTH CAMBRIA FUEL COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) *(Title)*

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building—10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Tel. No. (412) 644-2969.

APPENDIX E

NATIONAL LABOR RELATIONS ACT, SECTIONS 8(a)(1), 8(a)(3), 10(c), 29 U.S.C. §§158(a)(1), 158(a)(3), 160(c)

§8. Unfair Labor practices.

(a) It shall be unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. §157];

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [29 U.S.C. §§151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 U.S.C. §159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) [29 U.S.C. §159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided, further, That no employer shall justify any discrim-

ination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * *

§10. Prevention of unfair labor practices.

* * *

(c) Reduction of testimony to writing—Findings and orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [29 U.S.C. §151-158, 159-168]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of

section 8(a)(1) or section 8(a)(2) [29 U.S.C. §158(a)(1), (2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such practices, or within such further periods as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS
CLERK

No. 81-474

In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTH CAMBRIA FUEL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
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Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board reasonably determined that employee Wuchina did not engage in strike misconduct that would warrant denying him protection under the National Labor Relations Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-474

NORTH CAMBRIA FUEL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 645 F. 2d 177. The Board's decision and order (Pet. App. C-1 to C-9) and the decision and order of the administrative law judge (Pet. App. D-1 to D-15) are reported at 247 N.L.R.B. No. 176.

JURISDICTION

The judgment of the court of appeals (Pet. App. B-1 to B-2) was entered on June 12, 1981. The petition for certiorari was filed September 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the spring of 1978, the United Mine Workers of America, Local 1880 (the Union), called a strike against petitioner North Cambria Fuel Company, Inc. (NCF), after

NCF refused to accept a contract negotiated between the Union and the Bituminous Coal Operators Association, of which NCF was not a member. The strike was marked by violence, and NCF obtained a state court injunction prohibiting the Union, *inter alia*, from maintaining more than four pickets at the entrance to NCF's worksite on interstate highway I-22 in Pennsylvania. (Pet. App. C-2, D-3.)

On July 10, 1978, the day after a heated union meeting at which the strikers were urged to put on "a show of force," approximately 30 strikers gathered near the entrance of the I-22 worksite. Several strikers discussed the possibility of throwing rocks at trucks entering the site, but employee Wuchina stated that he would not do so. (Pet. App. D-3 to D-4.) Thereafter, six trucks approached the site, and the strikers assembled at the entrance. In an attempt to prevent the trucks from entering the worksite, the strikers shouted vulgarities, picked up rocks, and made obscene gestures at the drivers. (*Id.* at C-3, D-4 to D-5.) Soon after the striker's blocked the entrance, the county sheriff arrived and, invoking the state court injunction, ordered all but the permissible four pickets to disperse. The strikers immediately left the site entrance, and Wuchina got into his car and drove away from the site. The six trucks then entered petitioner's premises unimpeded. (*Id.* at C-3, D-5.) Shortly thereafter, the sheriff—followed by four of the trucks—left the site without incident. When the two remaining trucks attempted to leave a few minutes later, however, employee Baughman and six others ("the Baughman group") joined another group of strikers and returned to the entrance, where some of the strikers threw rocks at the lead truck, breaking its windshield. (*Ibid.*).

Early the following October, the strikers who participated in the July 10 "show of force" were found in contempt of the state court injunction. NCF also pressed criminal

charges against Wuchina and the Baughman group, charging them with riot, criminal trespass, and propulsion of missiles into an occupied vehicle. The seven strikers in the Baughman group subsequently entered guilty pleas to charges of disorderly conduct. Wuchina, however, pleaded not guilty, and the charges against him were ultimately dismissed for failure to prosecute. (Pet. App. C-3, D-7.)

On November 16, 1978, NCF discharged the Baughman group, citing their involvement in "illegal criminal conduct" on July 10. Although NCF permitted Wuchina to return to work in September, it discharged him as well following the preliminary hearing on the criminal charges against him. (*Id.* at C-3 to C-4, D-7.)

2. The discharged employees filed complaints against NCF with the National Labor Relations Board. Following a hearing on the complaint, the administrative law judge (ALJ) concluded that NCF had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging the employees because they had been engaged in protected strike activity. The Board, on review of the ALJ's decision, found that the Baughman group's involvement in the rock-throwing incident was sufficiently serious to remove their conduct from the protection of the Act. Accordingly, the Board reversed the ALJ and concluded that NCF did not violate the Act by discharging the seven strikers in that group[1] (Pet. App. C-3 to C-4). The Board, however, upheld the determination of the ALJ that NCF had violated Section 8(a)(3) and (1) of the Act by discharging Wuchina. The Board affirmed the ALJ's findings that Wuchina had not participated in the rock-throwing incident and that his participation in the

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[1]The court of appeals upheld this determination (Pet. App. A-7 to A-10); no issue concerning it is raised here.

initial blockade of the trucks was not "misconduct sufficiently serious to meet the Board's standard for justifying termination of a striker."[2] (Pet. App. D-8 to D-9.)

3. The court of appeals upheld the Board's finding that Wuchina did not participate in the rock-throwing incident and sustained the Board's conclusion that Wuchina's participation in the initial confrontation with the trucks did not constitute serious strike misconduct. The court noted that the Board "is entitled to deference in drawing the line between strike misconduct and protected activity" (Pet. App. A-7). The court agreed that Wuchina's actions constituted "minor acts of misconduct" that did not justify stripping his strike activity of the protection of the Act (Pet. App. A-6). As the court explained (Pet. App. A-6 to A-7):

> There was neither any violence nor any damages or injuries. Although the strikers used obscenities and attempted to provoke the truck drivers, these actions are not serious strike misconduct. In addition, interference with the employer's operations was slight and lasted only for a short time, and the strikers stopped blocking the entrance to the facility as soon as the sheriff arrived. * * *

ARGUMENT

The protection the National Labor Relations Act affords to employees exercising their right to strike is not affected by minor acts of misconduct that "must have been in the contemplation of Congress when it provided [for the right to strike]." *Republic Steel Corp.* v. *NLRB*, 107 F. 2d 472,

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[2]The ALJ noted that, although NCF's discipline of Wuchina was based in part on its erroneous belief that Wuchina actually threw a rock at one of the trucks, "good faith belief is not enough" to justify termination if the striker did not actually engage in the conduct for which he was disciplined (Pet. App. D-8).

479 (3d Cir. 1939), modified in part, 311 U.S. 7 (1940).[3] Employees lose the Act's protection, however, when they engage in "serious violence." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939). Petitioner does not dispute these principles (Pet. 6). Rather, it contends that Wuchina's conduct here constituted serious strike misconduct. That issue does not warrant review by this Court.

Contrary to petitioner's contention (Pet. 6-11), the court below properly sustained the Board's conclusion that the protection of the Act is not lost by a striker's mere use of abusive language, ambiguous threats, or other provocative though non-violent conduct, and that decision is fully in

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[3]As the court of appeals noted in *Republic Steel, supra*, 107 F. 2d at 479:

> [S]ome disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act, [29 U.S.C. 163], that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory. We accordingly [have] * * * held that it was not intended by the Act that minor disorders of this nature should deprive a striker of the possibility of reinstatement.

Accord: *Associated Grocers, Inc.* v. *NLRB*, 562 F. 2d 1333, 1335 (1st Cir. 1977); *Allied Industrial Workers, Local Union No. 289* v. *NLRB*, 476 F. 2d 868, 879 (D.C. Cir. 1973); *NLRB* v. *Hartmann Luggage Co.*, 453 F. 2d 178, 183-184 (6th Cir. 1971). Cf. *Milk Wagon Drivers Union, Local 753* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) (right of free speech on the picket line "cannot be denied" on the basis of "a trivial rough incident or a moment of animal exuberance").

accord with the decisions of the other circuits on this issue.[4] Moreover, the disruption of petitioner's operations occasioned by Wuchina's misconduct "was slight and lasted only for a short time" (Pet. App. A-7), and was not the sort of disruption uncommon in the heated atmosphere created by a strike.[5]

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[4]See, *e.g.*, *Associated Grocers, Inc.* v. *NLRB*, 562 F. 2d 1333, 1335 (1st Cir. 1977) (striking employees did not lose protection of the Act by spitting on company security car window as it crossed picket line, or by cursing and making obscene gestures at supervisors crossing picket line); see also *NLRB* v. *W.C. McQuaide, Inc.*, 552 F. 2d 519, 526, 528 (3d Cir. 1977) (ambiguous threats and abusive language do not withdraw the protection of the Act).

The decisions cited by petitioner (Pet. 7-9) present substantially more egregious misconduct than that involved here. See, *e.g.*, *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 248-250 (1939) (week-long occupation of company buildings followed by pitched battle); *W.J. Ruscoe Co.* v. *NLRB*, 406 F. 2d 725, 726-727 (6th Cir. 1969) (pushing and rocking vehicles crossing picket line; pulling one driver from the cab of his truck and smashing its windshield); *W.T. Rawleigh Co.* v. *NLRB*, 190 F. 2d 832, 837-838 (7th Cir. 1951) (forcibly preventing non-strikers' entrance to employer's premises for more than a month by actual physcial violence); *Kayser-Roth Hosiery Co.* v. *NLRB*, 447 F. 2d 396, 400 (6th Cir. 1971) (jamming bus so as to deny its use to employees wishing to work); *NLRB* v. *Moore Business Forms, Inc.*, 574 F. 2d 835, 843-846 (5th Cir. 1978) (making threats and throwing eggs in context of violent strike involving gunfire and throwing of missiles); *NLRB* v. *Pepsi Cola Co. of Lumberton, Inc.*, 496 F. 2d 226, 228 (4th Cir. 1974) (threats of physical injury to persons seeking a job with employer); *NLRB* v. *Ohio Calcium Co.*, 133 F. 2d 721, 727-728 (6th Cir. 1943) (violence and rock throwing); *NLRB* v. *Trumbull Asphalt Co.*, 327 F. 2d 841, 845 (8th Cir. 1964) (rock wielder threatened to beat up non-striking employee and family); *NLRB* v. *Longview Furniture Co.*, 206 F. 2d 274, 275 (4th Cir. 1953) (intimidating and obscene language directed at non-striking employees over course of strike to prevent non-striking workers from entering premises).

[5]See, *e.g.*, *Kayser-Roth Hosiery Co.* v. *NLRB*, *supra*, 447 F. 2d at 400, enforcing in part, 187 N.L.R.B. 562, 572-573, 575-576 (1970) (striking employees did not lose protection of the Act by briefly impeding or preventing ingress and egress from employer's premises); *Terry Coach Industries, Inc.*, 166 N.L.R.B. 560, 562-563 (1967), enforced, 411 F. 2d 612 (9th Cir. 1969) (temporary blocking of ingress by mass picketing). See also note 4, *supra*.

Petitioner's final argument (Pet. 14-17), that its discharge of Wuchina was not unlawful because it was not motivated by anti-union animus but by a reasonably based—albeit mistaken—belief that Wuchina had engaged in serious strike misconduct, is not properly raised here. Petitioner did not raise this argument before either the Board or the court of appeals. Accordingly, petitioner is foreclosed from making the argument here. See, *e.g., Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, this Court has long held that the Board need not establish anti-union animus where, as here, an employee is singled out for adverse action because of his participation in protected activity. See *NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 22-24 (1964); *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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